Constitutional Law Group June 27, 2016 European Union, UK government, UK Parliament
Nick Barber, Tom Hickman and Jeff King: Pulling the Article 50 'Trigger': Parliament's Indispensable Role
Barber-Hickman-KingIn this post we argue that as a matter of domestic constitutional law, the Prime Minister is unable to issue a declaration under Article 50 of the Lisbon Treaty – triggering our withdrawal from the European Union – without having been first authorised to do so by an Act of the United Kingdom Parliament. Were he to attempt to do so before such a statute was passed, the declaration would be legally ineffective as a matter of domestic law and it would also fail to comply with the requirements of Article 50 itself.

There are a number of overlapping reasons for this. They range from the general to the specific. At the most general, our democracy is a parliamentary democracy, and it is Parliament, not the Government, that has the final say about the implications of the referendum, the timing of an Article 50 our membership of the Union, and the rights of British citizens that flow from that membership. More specifically, the terms and the object and purpose of the European Communities Act 1972 also support the correctness of the legal position set out above.

The reason why this is so important is not only because Article 50, once triggered, will inevitably fundamentally change our constitutional arrangements, but also because the timing of the issue of any Article 50 declaration has major implications for our bargaining position with other European States, as we will explain.

(i) Article 50

The relevant provisions of Article 50 read as follows:

Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
The first point to note about Article 50 is that it is a once-and-for-all decision; there is no turning back once Article 50 has been invoked. If no acceptable withdrawal agreement has been reached after two years, the exiting Member State is left without any deal with the EU. It is of course possible to extend the time period. But this is in the gift of the EU Council and requires its unanimous agreement.

It may be argued that implicit within paragraphs 2 and 3 is a right for the member state to revoke the notice to withdraw. Yet this argument depends on reading such a right into a text from which it is conspicuously absent. That text clearly provides that only the terms of withdrawal itself are negotiable and states that if agreement is not reached then the Treaties cease to apply to the State concerned. The point is however probably moot since the UK must trigger Article 50 expecting and intending to exit the EU. And it could not safely assume that it is able to withdraw notification on the basis of the terms of Article 50.

Article 50 therefore tips the balance of negotiating power massively in favour of the remaining EU States. The UK has far more to lose from withdrawing from the EU with no deal in place than has the EU. Whilst the EU does want access to the UK market, it knows that the UK will be in a very weak bargaining position during withdrawal negotiations, with extremely dire consequences for the UK economy if it were to leave without any deal. This is likely to limit the UK's negotiating position in relation to key aspects of the exit deal.

The question of how an Article 50 notification can be given is consequently of paramount importance. Unfortunately, this is less clear than it might first appear. The first paragraph

of Article 50 specifies that the decision to leave the Union, which must be made before the Article 50 declaration, must be made in 'accordance with its own constitutional requirements' – but what are these requirements in the British system?

(ii) The Domestic Constitutional Requirements For an Article 50 Declaration

In his resignation speech, David Cameron said:

"A negotiation with the European Union will need to begin under a new Prime Minister, and I think it is right that this new Prime Minister takes the decision about when to trigger Article 50 and start the formal and legal process of leaving the EU."

The Prime Minster did not specify the legal authority under which he believed he or his successors might invoke Article 50, but the typical answer will be obvious to constitutional lawyers: it is the royal prerogative, a collection of executive powers held by the Crown since medieval times, that exist unsupported by statute. The Prerogative is widely used in foreign affairs, which Parliament has largely left in the hands of the Government. The treaty-making prerogative of the Crown is one such area.

If the Prime Minister is correct, and the Prerogative is the basis for the declaration, he enjoys complete discretion about when to issue the declaration: the trigger could be pulled in October, next year, or in ten years' time.

The relationship between statute and the prerogative has long been contentious, and up until quite recently – the 1980s – it was arguable that the exercise of prerogative powers (though not their existence) was beyond the capacity of the court to review; the King could do no wrong. Whilst the courts might not have been able to review its exercise, they certainly could and did rule on whether the prerogative contended for by the Crown existed in the first place. One of the earliest limits on the prerogative was that it could not be used to undermine statutes; where the two are in tension, statute beats prerogative. In one of the seminal cases of the common law, The Case of Proclamations, (1610) 12 Co. Rep. 74 Sir Edward Coke declared:

> "..the King by his proclamation… cannot change any part of the common law, or statute law, or the customs of the realm…"

A more recent statement of this principle can be found in the Fire Brigades Union Case [1995] 2 AC 513 in 1995, where Lord Browne-Wilkinson stated that:

"…it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament as expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme…"

This case law forms a core part of the separation of powers in the British Constitution: the Government cannot take away rights given by Parliament and it cannot undermine a statute. For the courts to hold otherwise would place the rights of British citizens at the mercy of the Government and would be contrary to Parliamentary supremacy.

Admittedly, and with most aspects of our constitutional law, the precise ambit of the principle invoked in the Fire Brigades Union case, and in associated case law, is open to different interpretations. A narrow one would limit its application to situations where the statute proscribes in detail how Government must act, but where the Government circumvents that guidance by recourse to the prerogative. The wider principle is that it is not open to Government to turn a statute into what is in substance a dead letter by exercise of the prerogative powers; and that it is not open to the Government to act in a way which cuts across the object and purpose of an existing statute. In our view the wider principle correctly states the law and is particularly apt here, as we are concerned with a constitutional statute upon which an extensive system of rights is founded.

This argument does not entail that the Government can never withdraw from an incorporated treaty. Everything depends on the terms, object and purpose of the statute in question. The Human Rights Act 1998, for instance, incorporates the European Convention on Human Rights in a very different way.

(iii) The Consequences for Article 50

As we have seen, the purpose of a Member State embarking on the Article 50 process is to withdraw from the EU. The EU Treaties "cease to apply" to the UK immediately upon either, (i) the entry into force of the concluded agreement, or (ii) the expiry of the two year guillotine (subject to unanimous agreement to extend). Can such a decision be made by the Government alone, even following a referendum?

First, the European Communities Act 1972 is, as its long title states, an Act "to make provision for the enlargement of the European Communities to include the United Kingdom". The long title of the Act is a permissible aid to interpreting the terms, and object and purpose of the Act.

Section 2 then provides that all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties are part of UK law.

The obvious intention of the Act is to provide for the UK's membership of the EU and for the EU Treaties to have effect in domestic law. The purpose of triggering Article 50 would be cut across the Act and render it nugatory. Once a withdrawal agreement took effect, or if not deal was reached, the 1972 Act would be left as a dead letter. It would instruct judges to apply the Treaties which themselves declare they had "ceased to apply" to the UK. Indeed, there would not be any need for Parliament to repeal the 1972 Act once the Article 50 process was completed because there would be no remaining rights and obligations for the UK under the terms of the EU Treaties.

It is not an answer to say that section 2 refers to rights and liabilities "from time to time arising" under the Treaties because this is obviously intended to cater for the changing rights and obligations of the UK under EU law, such as to comply with EU legislation, within the EU. It does not allow the Government to do an act which would resulting the withdrawal from the EU Treaties, which cuts across the whole object and purpose of the 1972 Act, which is to make the UK part of the EU.

Some might argue that there would be no such conflict since the 1972 Act does not regulate the process of withdrawal, and because the executive act of withdrawal leaves the statute formally untouched. However this would be a very formalistic analysis in circumstances where the undoubted intention of the UK in triggering the Article 50 process would be to effect the opposite of that which the 1972 Act is designed to achieve.

By issuing an Article 50 declaration, the Prime Minister would start the process that would inevitably end in the loss of EU rights (even if a way was found to negotiate a set of substitute, non-Treaty rights).

Secondly, if this were not sufficient, the Article 50 declaration will strip British citizens of their rights in relation to the European Parliament. The European Parliamentary Elections Act 2002 confers a right to vote and to stand in European elections. The Government cannot unilaterally do an act which will render the 2002 Act nugatory and strip away the rights that it confers.

More examples could be given, but the general point is plain. Our membership of the European Union has conferred a host of legal rights on British citizens, some through incorporating statutes, some granted directly in domestic law. Applying the common law principle found in The Case of Proclamations and Fire Brigades Union, the Government cannot remove or nullify these rights without parliamentary approval. Its prerogative power cannot be used to overturn statutory rights. Statute beats prerogative.

This has significance not only in terms of our domestic law, but also for EU law. Article 50 specifies that a decision to leave the European Union must be made in conformity to a Member State's constitutional requirements. If the Prime Minister sought to issue an Article 50 without parliamentary approval, it would not satisfy this test; it would not be effective in European Law.

(iv) The Role of Parliament

It might be thought that this gives rise to something of a constitutional chicken and egg dilemma: how can Parliament legislate to take the UK out of the EU before the exit negotiations are complete? There is in fact a straightforward answer to this apparent conundrum. Before an Article 50 declaration can be issued, Parliament must enact a statute empowering or requiring the Prime Minister to issue notice under Article 50 of the Treaty of Lisbon, and empowering the Government to make such changes to statutes as are necessary to bring about our exit from the

European Union.

Is this a mere formality? The political reality might be "yes". Parliament might consider that following the referendum it must pass a statute in these terms. But the answer in constitutional terms is "no". As a matter of constitutional law, Parliament is not bound to follow the results of the Brexit referendum when deliberating this legislation. A number of options are constitutionally open to Parliament.

First, it could decide not to grant this power at all. As some of the core claims made by the leave campaign unravel, Parliament might decide that the case for Brexit has not been made – or was gained under a false prospectus. As Edmund Burke taught us, ours is a representative, not a direct, democracy. Those representatives whose consciences required them to reject the referendum vote would have to justify themselves to their electorates at the next General Election – an event that is likely to arrive quite soon. We should make clear that we take no position as to whether Parliament should adopt such a course, but it is undoubtedly open to Parliament as a matter of constitutional law. Parliament is, after all, sovereign.

Secondly, Parliament could conclude that it would be contrary to the national interest to invoke Article 50 whilst it is in the dark about what the key essentials of the new relationship with the EU are going to be, and without knowing what terms the EU is going to offer. Parliament might well conclude that to require the Government to issue the notice immediately would be contrary to the national interest, even if Parliament is committed to leaving the EU, because the legal structure of Article 50 would place the UK at a seriously disadvantageous position in negotiating acceptable terms. Surely, Parliament is unlikely to require the Government to issue notice under Article 50 if it considers that the Government might be forced to accept exit terms which do not protect key aspects of our economy. Parliament may therefore require the Government to engage in extensive informal negotiations or even to seek to negotiate exit from the EU by formal Treaty amendments rather than through the Article 50 process.

If the UK seeks to obtain some form of framework agreement on key terms before invoking Article 50, once these terms are in place, Parliament could then trigger the Article 50 procedure to effect exit, perhaps with only details left to negotiate by the Government. Immediately upon an agreement being finalised the UK would no longer be part of the EU. This option would comply with the outcome of the referendum.

Finally, of course, Parliament could decide to authorize notice under Article 50 at once by empowering the Prime Minister to issue the declaration.

There are very good reasons for involving Parliament. With its broad range of representatives and peers, various pertinent committees with extensive evidence gathering powers, it is an institution that has the expertise and legitimacy to discuss the implications of various withdrawal options and any framework conditions or further approvals that Parliament may want to stipulate. The referendum was silent on the terms of withdrawal. Such terms should be matters for cross-party discussion in open Parliament rather than among the front bench of a (divided) single party in closed Cabinet meetings.

Conclusion

Far from being a straightforward and streamlined process of exit, the Article 50 process raises very complicated legal and political issues and is pregnant with risk (additional to those inherent in existing outside the EU). These complexities are compounded by the murky ambiguities of our unwritten constitution.

The referendum result itself does not speak to the question of how the UK should leave the EU. It is up to the Government and to Parliament to ensure that the exit is managed consistently with the UK's national interest.

Our analysis leads to the possibility that the process of extraction from the EU could be a very long one indeed, potentially even taking many years to come about. Of course, the EU Member States have made clear that they will only negotiate once the Article 50 exit provisions have been triggered and are pressing the UK to pull the trigger "as soon as possible". It is also clear that uncertainty is itself undesirable. But uncertainty needs to be weighed against other imperatives, such as the need to comply with the UK's constitutional requirements and the need to ensure that Brexit is effected consistently with the national interest. A quick pull of the Article 50 trigger is unlikely to be feasible under the UK's constitutional arrangements and may well not be desirable for any UK Government or Parliament, even one committed to eventual

withdrawal from the EU.

Brexit is the most important decision that has faced the United Kingdom in a generation and it has massive constitutional and economic ramifications. In our constitution, Parliament gets to make this decision, not the Prime Minister.

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(Suggested citation: N. Barber, T. Hickman and J. King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', U.K. Const. L. Blog (27th Jun 2016) (available at https://ukconstitutionallaw.org/))